IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A19A2218

ETC OF GEORGIA, L.L.C.,

Appellant,

vs.

POLK COUNTY, GEORGIA,

Appellee.

APPELLANT'S MOTION TO STAY TRIAL COURT'S INJUNCTION PENDING APPEAL

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I. INTRODUCTION

Appellant and defendant below, ETC of Georgia, L.L.C. ("ETC"), respectfully moves this Court to stay the trial court's preliminary injunction concerning the operation of the Grady Road landfill in Polk County, Georgia (the "Landfill") for four reasons. First, ETC has a substantial likelihood of success on the merits because appellee and plaintiff below, Polk County, Georgia, is precluded as a matter of law from bringing a nuisance claim. Appellee cannot prevail on a nuisance claim because, for more than a decade, ETC's operation of the Landfill has been consistent with Georgia Environmental Protection Division ("EPD") oversight and permits, local and state law, and ETC's operating agreement with Polk County. Second, ETC faces irreparable harm in losing its right to appeal for mootness if the Court does not stay the trial court's injunction. Third, the preliminary injunction is unnecessary since comparatively little harm to Polk County exists and only a few, vocal county residents complain of Landfill odors. Fourth, public interest favors a stay because the injunction presents serious environmental risks including leachate breakouts, the buildup and escape of methane gas, and risks to neighboring cities.

II. FACTUAL BACKGROUND

ETC operates the Landfill pursuant to a Polk County Sanitary Landfill Operation Agreement dated February 25, 2002, and restated August 9, 2005, as amended. (the "Operating Agreement") (R-20-107, 257). The Landfill receives

waste from more than ten counties in Georgia and two counties in Alabama. (R-257).

In 2002, Polk County turned the operation of the Landfill over to ETC[1] due to public debt and increasing burden on Polk County taxpayers. (R-114). The Operating Agreement contemplates a cooperative, long-term agreement between ETC and Polk County to operate the Landfill. (*Id.*) Generally speaking, the Operating Agreement provides that ETC is responsible for all operations at the landfill and pays Polk County "host fees," which are a portion of the fees that ETC receives operating the Landfill. (R-124).

Under the Operating Agreement, Polk County grants ETC, as operator, complete control over the manner of operation. Section 3.2 of the contract reflects the parties' intent that "Contractor [ETC] shall have maximum flexibility in performing the landfill operations and other solid waste management operations contemplated by this Agreement, which includes, without limitation, performance of the Work, and the ability to accept Solid Waste and other wastes allowed by GA EPD and/or EPA, for disposal at the Landfill." (R-28). Section 3.2 provides that "[i]n order to assure viability for the Landfill, the parties hereto intend to develop markets for Solid Waste to increase the anticipated volume to be received at the

[1] Waste Industries acquired ETC in 2004 and has operated the Landfill since that time. (R-114).

Landfill." (*Id.*) Section 12.8 requires the parties to cooperate to effectuate the terms of the Operating Agreement. (R-45-46).

Under section 4.1 of the Operating Agreement, "Contractor [ETC] shall be responsible for procuring, modifying and renewing all permits, orders and licenses required for the Landfill to be fully operational as of the Commencement Date." (R-29). Section 2.1(c) obligates the County "to use best efforts to assist Contractor with any and all renewals, amendments and/or modifications of permits . . ." (R-26-27). Section 12.8 provides that the County is required to "support the efforts of Contractor in obtaining any additional permit modifications and approvals" and "not take any action or omission that would unreasonably impair or interfere with the performance of Contractor's obligations under this Agreement." (R-45-46). Polk County's complaint and its motion for a preliminary injunction is a flagrant breach of the Operating Agreement and wrongful interference with ETC's contractual right to operate the Landfill.

One example of Polk County's breach involves ETC's use of certain types of "daily cover" for the Landfill under the Operating Agreement. (R-343-52). Over the years, consistent with the Operating Agreement, daily cover at the Landfill has consisted of some combination of soil, tarps, and spray-on covers. (MT-23–24:18–6, April 23, 2019). The portion of the Landfill that receives daily cover is called the "working face." (R-345). The working face is an area within the Landfill, generally

up to 30,000 square feet in size, on which the solid waste and sludge brought to the Landfill each day is deposited and compacted. (*Id.*) Using daily cover helps reduce odor and animals attracted to that odor. (*Id.*) The daily cover is placed over the waste at the end of each work day and, prior to the injunction, was removed from the Landfill's working face the next morning so that operations on the working face could continue. (*Id.*) Until the trial court issued its injunction, for more than a decade, the working face had been covered with soil, tarps and/or daily synthetic covering. (MT-47–48:13–19, April 23, 2019).[2] As discussed below, that practice was expressly permitted under the Operating Agreement and EPD permits.

The issue here is relatively narrow: what ETC must use as daily cover on top of the working face: (a) a combination of soil and tarps, as ETC contends and as both the EPD and Operating Agreement permit, or (b) entirely soil as Polk County argues, despite the EPD permit and ETC's contractual right to use synthetic cover. In considering this issue, the Court should keep in mind that ETC's right to use tarp and other synthetic cover is undisputed. Section 5.9 of the Operating Agreement specifically states that "Contractor [ETC] reserves the right to use synthetic or any

[2] Once the working face reaches a certain height, it receives a permanent soil covering, a synthetic covering, more soil, and then grass. (*Id.*) The Landfill's operation then moves to a different area of the Landfill and the process begins anew. (*Id.*) After several decades, the result of this dumping, compacting, and covering with a final layer of soil operation is a hill covered in grass. (*Id.*)

other acceptable alternative daily cover, per Georgia EPD [Environmental Protection Division] regulations." (R-32). Georgia EPD regulations provide the following with respect to landfill operations,

> *Alternative materials (such as foams or tarps) of an alternative thickness (other than at least six inches of earthen material) may be approved by the Director* [of Georgia EPD] if the owner or operator demonstrates that the alternative material and thickness control disease vectors, fires, odors, blowing litter, and scavenging without presenting a threat to human health and the environment.

Ga. Comp. R. & Regs. 391-3-4-.07 (3)(e)(2) (emphasis added).

Here, Georgia EPD has approved the use of alternative materials for daily cover, such as foams or tarps, at the Landfill since 1994, long before ETC took over operations. (R-384, 388-89; *see also* MT-137:3–5, Apr. 17, 2019). Since 2002, ETC had used of a combination of tarps, foams, and soil for daily cover at the Landfill, consistent with EPD regulations and permits. (MT-159:16–25 Apr. 17, 2019). In fact, Georgia EPD, which has statutory oversight of ETC's operation (including the use of tarp, foams, and soil for daily cover) conducts inspections multiple times per year to ensure compliance. (MT-139:9. Apr. 23, 2019). In 2016–2018 Georgia EPD conducted seven inspections of the Landfill and gave ETC six 100% grades and one 95% grade. (*Id.*)

Notwithstanding EPD's oversight and approval, a vocal minority of citizens who live near the Landfill have complained to ETC about odors and buzzards

incident to the Landfill's operations for the past decade or more. (*See, e.g.*, MT-49:7–13, April 17, 2019). To address these complaints, ETC voluntarily implemented and offered in 2018 myriad, expensive measures to reduce odors and buzzards:

- Propane air cannons to disperse buzzards with a high-pitched sound;
- Offering the installation of electronic strips on top of nearby residences at ETC's expense;
- Spraying misting deodorizers and hiring a full-time employee to oversee the same;
- Expanding the gas management system by installing additional gas wells;
- Hiring a full-time employee to sweep out trucks after they deposit trash at the Landfill to ensure no trash gets tracked out;
- Testing and implementing "Posi-Shell" and TOPCOAT": spray-on foams to supplement the use of soil and tarps as daily cover; and
- Hiring a full-time employee to monitor odors and investigate odor complaints with a device called a "Nasal Ranger."

(R-138-43; MT. 138-139:24–17, Apr. 17, 2019).

Notwithstanding these voluntary measures and ETC's compliance with the Operating Agreement, state regulations, and Georgia EPD permits, Polk County contends that ETC is liable for maintaining a public nuisance at the Landfill from odor and buzzards.

III. PROCEDURAL HISTORY

Polk County filed its Amended Complaint on February 6, 2019. (R-256-267). In the Amended Complaint, Polk County alleged a claim for public nuisance and two breach of contract claims for monies ETC allegedly owes the County under the Operating Agreement.[3] (R-258-65). ETC filed counterclaims for breach of contract, breach of fiduciary duty, declaratory judgment, and attorneys' fees. (R-114-27, 275).

On February 28, 2019, Polk County moved for a preliminary injunction. (R-277-81). With no contractual basis, Polk County argued that ETC had breached the Operating Agreement by failing to provide adequate ground cover, leading to odors and a "proliferation of buzzards." (R-278). Polk County moved the trial court to order ETC to modify its operations in the following ways:

1. Use six inches of soil daily to cover any waste deposited in the landfill on that day;

2. Leave the previous day's soil cover in place (no stripping or removing of the dirt used to cover waste from the previous day);

3. Cover sludge or other odorous loads of waste daily within the working face of the landfill;

4. Record and investigate odor complaints to determine the source and patterns of the odors, including the leachate pond;

5. Maintain and expand the gas collection system in accordance with the approved methane gas extraction plan; and

[3] The two breach of contract claims against ETC are not at issue in this appeal.

6. Use appropriate misting deodorizers or neutralizers at strategic locations around the landfill.

(R-279).

The motion was never intended to preserve the status quo. To the contrary, the motion, on its face, was intended to create a 90-day test period, which Polk County's expert described as "trial and error." (MT:147, April 17, 2019). Polk County also requested during the hearing on its motion that the trial court appoint a county representative to oversee these six provisions and to have unfettered access to the Landfill. (R-279). Polk County's motion offered no evidence in support of its request for preliminary injunction and failed to cite any legal authority for such relief. (*See* R-277-80).

ETC timely responded in opposition on April 1, 2019, outlining various deficiencies in the motion. (R-286-334) The trial court held hearings on the preliminary injunction on April 17 and April 23, 2019. (MT-Vols. 5, 6). On April 25, 2019, ETC filed a supplemental response in opposition to the motion. (R-339-42). On May 2, 2019, the Court issued an order granting Polk County's motion for a preliminary injunction. (R-343-52). That order adopted each of the six provisions requested by Polk County, appointed a county representative to provide oversight, and, even though Polk County's motion did not request such relief, enjoined ETC from accepting sludge at the Landfill. (*Id.*)

ETC timely filed a notice of appeal to this Court on May 8, 2019. (R-1-3). ETC also moved the trial court to stay its injunction pending appeal. (R-355-67). Polk County objected to a stay of the injunction on May 16, 2019. (R-372-82). The trial court held a hearing on the motion to stay on May 22, 2019 and denied the motion to stay by written order the same day. (R-392-96).[4] This Court docketed the present appeal on June 10, 2019. Now, ETC moves this Court for a stay of the trial court's injunction pending ETC's appeal to this Court.

IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction rather than the Supreme Court because the case is not reserved for the appellate jurisdiction of the Supreme Court pursuant to the Georgia Constitution and statute. *See* GA. CONST. ART. 6, § 5, ¶ 3; ART. 6, § 6 ¶¶ 2, 3; O.C.G.A. § 15-3-3.1(a)(2). The trial court's preliminary injunction is directly appealable as a matter of right under O.C.G.A. § 5-6-34(a)(4).

V. ARGUMENT AND CITATION OF AUTHORITIES

This Court has the inherent "authority to grant a stay or injunction pending appeal." *Green Bull Georgia Partners, LLC v. Register*, 301 Ga. 472, 473 (2017). In considering to stay an injunction pending appeal, this Court "must weigh all of the pertinent equities, including the [1] likelihood that the appellant will prevail on the

[4] ETC filed a notice of appeal of the May 22 Order to the extent necessary to confer jurisdiction and so that this Court could grant complete relief, including a stay pending appeal.

merits of his appeal, [2] the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, [3] the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and [4] the public interest." *Id.* Likely success on the merits is the "most important of these considerations, [but] the applicant need not always show that he more likely than not will prevail on appeal." *Id.* at 474. "If the other equities weigh strongly in favor of a stay or injunction pending appeal, that the appellant presents a 'substantial case on the merits of his appeal' may be enough." *Id.*

This standard is similar to that of granting a preliminary injunction, with some differences. "For one thing, the likelihood that a party will prevail at trial on the merits of the claims presented in the lawsuit is not inevitably the same as the likelihood that the same party will prevail on the merits of an appeal, which may present different or narrower issues." *Id.* at 475. Further, "[t]he assessment of irreparable harm may differ under the two standards, inasmuch as an application for a stay or injunction pending appeal may present an additional sort of irreparable harm—the prospect of the appeal becoming moot and the right of appellate review being lost as a result." *Id.* Finally, "[a]s to the harm that injunctive relief may do to others, an injunction pending appeal will, in most cases, expose the appellee and other interested parties to such harm for a shorter time than an injunction pending final resolution of all of the proceedings in the trial court." *Id.*

A. ETC is likely to prevail on the merits of its appeal.

This Court reviews a trial court's entry or denial of a preliminary injunction for abuse of discretion. O.C.G.A. § 9-5-8. "[A] trial judge manifestly abuses his discretion when he grants an injunction adverse to a party without any evidence to support such judgment and contrary to the law and equity; such judgment is so clearly wrong as to amount to an abuse of discretion." *Bruce v. Wallis*, 274 Ga. 529, 531 (2001); *see also Mathis v. BellSouth Telecommunications*, 301 Ga. App. 881, 881 (2010) (decision is an abuse of discretion if it is "unsupported by any evidence of record or where [the] ruling misstates or misapplies the relevant law"); *Glisson v. Global Security Svcs.*, 287 Ga. App. 640, 640 (2007) (an abuse of discretion occurs if a trial judge awards injunctive relief "without any evidence to support such judgment and contrary to the law and equity").

1. Polk County's nuisance claim is foreclosed as a matter of law.

The trial court erred in granting a preliminary injunction because Polk County's nuisance claim is foreclosed as a matter of law. That nuisance claim is foreclosed because Polk County owns the Landfill, and ETC is operating squarely within the terms of the Operating Agreement and all applicable laws and permits. Put another way, what Polk County sought to enjoin is what Polk County and the Georgia EPD expressly permitted ETC to do.

Georgia law is clear that where a defendant has complied with local and state laws, and is operating consistent with an agreement with the local government, there is no public nuisance as a matter of law. *See Vason v. S.C. R. Co.*, 42 Ga. 631, 638 (1871), overruled in part on other grounds by *Augusta & S.R. Co. v. City Council of Augusta*, 100 Ga. 701 (1897) ("We hold, therefore, that the use of steam on this railroad is specially permitted by the public authorities, and that it cannot, therefore, be abated as a nuisance."); *see also Downside Risk, Inc. v. MARTA*, 156 Ga. App. 209, 214 (1980) ("If a public project is legislatively sanctioned it cannot be adjudged a nuisance.").

This Court has held "[t]hat which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance. Thus, where the act is lawful in itself, it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience or damage of another." *Effingham Cty. Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 755 (2004) (citing *City of Douglasville v. Queen*, 270 Ga. 770, 773 (1999)). Applying this bedrock principle, this Court held in *Anderson v. Atlanta Comm. for Olympic Games, Inc.*, 261 Ga. App. 895, 900 (2003),

> Since [the defendant's] Park itself was lawful, it could have become a nuisance only if conducted in an illegal manner. There is, however, no evidence that [defendant] operated the Park in an illegal manner. On the contrary, the undisputable fact is that [defendant] operated the Park lawfully. Because the Park was a legal enterprise operated as the law authorized, it cannot have been a nuisance. The trial court therefore did not err in granting summary judgment to [defendant] on the nuisance claim.

In briefing below, Polk County argued that even though the Landfill and ETC's operations are lawful and permitted, Polk County still has a nuisance claim because the Landfill is a nuisance *per accidens*. (R-374-76). "A lawful business may, by reason of its location in a residential area, cause hurt, inconvenience, and damage to those residing in the vicinity and become a nuisance *per accidens* (a nuisance by reason of circumstances and surroundings). . . . " *Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360, 360–61 (1986). However, where a business is lawful, it is a nuisance *per accidens* only when conducted in an illegal manner to the hurt, inconvenience or damage of another. *Shuler Bros.*, 265 Ga. App. at 755.

In *Shuler Brothers*, for example, Shuler Brothers Inc. contracted to manufacture and sell wood chips to a local paper mill, which required the construction of a new plant. *Id.* at 754. After finding a site suitable for a new plant, Shuler Brothers sought and received approval from Effingham County to rezone the site and construct a wood-chip plant. *Id.* Shuler Brothers then began operation of the plant. *Id.* However, the county subsequently cited Shuler Brothers for violating a local noise ordinance and attempted to limit the mill's operation to the hours between 7:00 AM and 6:00 PM. *Id.* Shuler Brothers sued the county for a declaratory judgment regarding its operations, and the County counterclaimed for a public nuisance. *Id.* The trial court granted summary judgment to Shuler Brothers. *Id.*

On appeal, this Court affirmed summary judgment, reasoning: "[T]here is no evidence in the record that Shuler Brothers operated the chip mill in an illegal manner. On the contrary, the undisputable fact is that Shuler Brothers operated the chip mill lawfully." *Id.* This Court further held that [t]he injuries and inconveniences to persons residing near this [chip mill], such as noises, etc., which result *ordinarily and from necessity in the conduct of their business are not to be classed as nuisances*." *Id.* (emphasis added).

Here, as in *Shuler Brothers*, when the preliminary injunction was entered, ETC was operating the Landfill lawfully and in accordance with EPD permits and regulations. At the preliminary injunction hearings, the County offered no evidence that ETC had breached its Operating Agreement or is otherwise operating illegally. Further, the County's own expert, Kent McCormick, testified in deposition and during the hearing that ETC was operating within the Georgia EPD permits by using tarps and/or spray on daily covers:

> Q. Do you have any opinions today that anything ETC is doing or allegedly is doing violates its permit?
> A. It's my opinion that they are not violating their permit. (McCormick Dep., p. 15).[5]

[5] On June 12, 2019, counsel discovered that although the transcripts for the preliminary injunction hearing on April 17 and 23 were forwarded by the trial court for the appellate record, the underlying exhibits to those hearings were not. The trial court clerk indicated that those exhibits are being processed and sent. If the Court wishes, counsel can update this briefing with proper citations to those exhibits once

* * *

25 Q. Okay. Let me see if I can summarize it. As
1 of September 25th, 2017, you were not aware of
2 anything that ETC was doing that violated its permits,
3 correct?
4 A. Correct. (*Id.* pp. 23-24).

***

13 Q. You would agree with me that Posi-Shell is
14 permitted by ETC and Waste Industries' permits?
15 A. It is permitted, yes. (*Id.* p. 35).

(*See also* MT-133:1, 137:3–5).

ETC's operations manager, James Cummings, also testified and confirmed the same:

> Q. Okay. Waste Industries is operating this landfill in accordance with all of the EPD regulations for the operation of a landfill?
>
> A. Yes.

(MT-70: 8–11, Apr. 23, 2019).

At the April 17, 2019 hearing, the County did offer an April 8, 2019 email from Chad Hall presumably to suggest, without affirmatively stating, that Georgia EPD had revoked the use of tarps as daily cover. (Ex. P21). However, David Pepper, who serves as Waste Industries' Vice President of Capital Projects, testified that Mr.

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the Court supplements the record with the hearing exhibits. Those exhibits are cited herein as "Ex."

Hall had admitted that he was mistaken and that ETC's use of soil and tarps was still permitted. (MT-178: 7–9, Apr. 23, 2019.) Mr. Hall confirmed that mistake and that ETC's use of soil and tarps as daily cover is authorized. On May 2, 2019, he wrote:

> I want to make one correction to the email I sent on April 8 regarding daily cover at the Polk County Grady Road Landfill. In that message I said "The facility should revert to using soil for daily cover." That statement was an over-simplification. The facility has been approved to use tarps as alternate daily cover since 1994. EPD hasn't seen anything in our files that took away or suspended this approval to use tarps as alternate daily cover. The facility could remain in compliance using either soil or tarps for daily cover. (R-365-66).

Finally, even assuming that EPD did revoke the use of tarps as daily cover, testimony established that ETC reverted to using soil for daily cover on April 8, 2019. (MT-144: 18-21, Apr. 23, 2019). Thus, ETC was never operating outside of its permits or the law.

The trial court noted in its preliminary injunction order and its order denying a stay pending appeal that the minor modification of ETC's permit only allowed the use of Posi-Shell as an alternative spray-on cover, not TOPCOAT, and that this permit was revoked. (R-346, ¶ 11; R-393, ¶¶ 3-4).[6] At the outset, uncontroverted

[6] The permit was revoked on a technicality. EPD noted that the permit was issued in the name of the operator, ETC, instead of Polk County, even though, as explained above, under the Operating Agreement, ETC has exclusive authority for obtaining necessary permits. (R. 29, 45-46). Polk County's efforts to interfere with permit that permit were a breach of the Operating Agreement.

evidence established that the minor modification allowed spray-on covers "such as Posi-Shell and that TOPCOAT was demonstrated for several county representatives and approved for use at the Landfill. (MT-114:5–25, Apr. 23, 2019). Regardless, the trial court missed the point. When the revocation of the TOPCOAT occurred, because of Polk County's wrongful interference with ETC's permit, ETC immediately, prior to the entry of the injunction, returned to using soil and tarps, which both the EPD permit and the Operating Agreement expressly permit. In other words, ETC's temporary use of TOPCOAT in reliance upon the issuance of the EPD permit is irrelevant and does not justify the issuance of the injunction. The trial court's order denying a stay ignores the EPD permit and the Operating Agreement.

In sum, the evidence in this case established that (1) ETC was at all times operating consistent with the Operating Agreement with Polk County and (2) ETC's use of daily cover was approved by Georgia EPD regulations and permits.

Polk County below relied on *Galaxy Carpet Mills v. Massengill* to argue that even though ETC's operations are lawful, they are still a nuisance. 255 Ga. 360. That reliance is misplaced. In *Galaxy Carpet Mills*, homeowners sued a neighboring carpet plant to enjoin the plant's use of boilers. *Id.* Significantly, the plant had operated for 12 years previously without issue but had recently begun using coal-fired boilers for energy, which emitted large amounts of soot and ash, and created loud and offensive noises. *Id.* The jury returned a verdict for plaintiffs on the

nuisance claim. *Id.* On appeal, the Supreme Court rejected the plant's argument that it was entitled to a directed verdict for nuisance because the boilers were operated consistent with Georgia EPD permits. *Id.* at 360–361.

Galaxy Carpet Mills is distinguishable for four reasons. First, ETC's operations are "in a location specifically negotiated and []zoned for the operation of a [Landfill]." *Shuler Bros.*, 265 Ga. App. at 755. Second, ETC has not "changed its method of operation after a period of many years or performed any action, illegal or otherwise, which would not ordinarily and necessarily be performed by a [landfill]." *Id.* In *Galaxy Carpet Mills*, the defendant "plant changed its method of operation after 12 years and began emitting large amounts of soot and ash and creating loud and offensive noises." *Id.* Third, *Galaxy Carpet Mills* involved a private rather than a public nuisance. Cases in which an injury produced by a lawful business was found actionable all have one thing in common: they are all private nuisances. *See*, *e.g.*, *Superior Farm Mgmt. v. Montgomery*, 270 Ga. 615 (1999); *Stone Man v. Green*, 263 Ga. 470 (1993); *Central of G. R. Co. vs. Collins*, 232 Ga. 790 (1974). Fourth, *Galaxy Carpet Mills* involved not just soot and ash, which were governed by relevant Georgia EPD permits, but loud and offensive noises from boilers, which were not.

Here, by contrast, the Landfill was specifically zoned and negotiated for operations as they currently are. In fact, Polk County established the Landfill's present location and requested the use of tarps and alternative cover years before

ETC took over. (MT-137:10–25, Apr. 23, 2019). Moreover, ETC has operated the Landfill consistent with its contractual and regulatory obligations for over a decade and has not recently changed its operations. (*Id.* 139: 4–9.) Third, this case involves Polk County bringing a public, not private, nuisance. Fourth, this nuisance claim centers on odors, which Georgia EPD permits, regulations, and inspections govern. (*Id.* 141: 21–23).

Because Polk County's nuisance claim is foreclosed as a matter of law, ETC will likely prevail on its appeal of the preliminary injunction. Thus, for this reason alone, this Court should stay the preliminary injunction pending appeal.

2. **The Preliminary Injunction does not preserve the *status quo*; it effectively rewrites the parties' Operating Agreement.**

Even if Polk County's nuisance claim were not foreclosed as a matter of law, the preliminary injunction is improper because it ignores the Operating Agreement and fails to preserve the *status quo*. ETC cited to the court below two cases where this Court reversed preliminary injunctions for alleged nuisances because the injunctions did not preserve the *status quo*. (R-358-59). In *DBL, Inc. v. Carsons*, plaintiff-landowners sought to enjoin the defendant's adjacent marina. 262 Ga. App. 252 (2003). The trial court granted the relief, and this Court reversed:

> The injunction did not serve to maintain the status quo. And we fail to see any irreparable harm to the landowners by virtue of DBL's continued operation of the marina. Indeed, the marina had been operating in front of their property for years. Under these circumstances, there is no urgency requiring that DBL's

> business be enjoined, and we therefore conclude that the trial court abused its discretion in granting the injunction.

Id. at 256–57.

This Court likewise reversed a preliminary injunction in *Green v. Waddleton*: "[p]retermitting a determination of the likelihood that Waddleton will prevail on the merits of her underlying [nuisance] claims, we find that the interlocutory injunction is not appropriate in this case because it does not serve to maintain the status quo." 288 Ga. App. 369, 370 (2007).

DBL, Inc. and *Green* control here. According to the order granting the preliminary injunction, the odor issue has persisted since 2008. (R-7). The record contains written evidence of complaints in 2014 and 2015. (Exs. P4-5, 7). Under the circumstances, no urgency required the entry of a preliminary injunction, and the trial court erred by ordering a preliminary injunction.

3. **The trial court erred by granting Polk County an injunction without sufficient evidence.**

Even if Polk County could state a claim for nuisance and even if a preliminary injunction were necessary to preserve the *status quo*, the trial court erred by granting an injunction without sufficient evidentiary support. "[A] trial judge manifestly abuses his discretion when he grants an injunction adverse to a party without any evidence to support such judgment . . . ." *Bruce v. Wallis*, 274 Ga. 529, 531 (2001);

see also Mathis v. BellSouth Telecommunications, 301 Ga. App. 881, 881 (2010) (decision is an abuse of discretion if it is "unsupported by any evidence of record").

Here, the trial court abused its discretion in granting a preliminary injunction because (1) there was no evidence of a nuisance, and (2) even assuming there was, there was no evidence that the injunctive relief requested would abate the alleged nuisance.

a) *Polk County presented no evidence of a nuisance based on odor from the Landfill.*

Polk County did not present evidence of imminent or continuing harm based on odor from the Landfill. For example, Polk County's first witness, local resident James Wilburn, testified that the Landfill odors at issue in this case have been present for "about 10 years" and there is nothing "in the last 30 or sixty days that's made it a lot worse . . . it's pretty much been that way all the time." (MT-49:9–13, Apr. 17, 2019). Similarly, Polk County's own expert Kent McCormick testified that the Nasal Ranger, a device that uses "an accepted method of monitoring and detecting odors and for quantifying and qualifying nuisance odors . . . indicated that there were no nuisance odorous levels that had been recorded since monitoring began in October of 2018." (*Id.* 139:7–17.) Mr. McCormick's September 25, 2017 report (Ex. P17) confirms he "noted little odor on [his] July 1 site visit" to the landfill. (*Id*., p. 5). On March 5, 2019, Mr. McCormick stated, "[t]ypical municipal solid waste odors were noted around the perimeter road around the landfill at the scale house." (Ex. P22, p.

2). He explained in that "these are the types of odors that one would expect at a municipal solid waste landfill." (*Id.*, pp. 26–27).

Put simply, Polk County presented no evidence of any imminent harm or worsening odors at the Landfill sufficient for the trial court to exercise its discretion to find the existence of a nuisance. Rather, the record merely established an odor that is incidental to *any* landfill's operation, and it is the same "four to five people" who have made the same complaints about the Landfill's odor to ETC. (MT-118:10–12 Apr. 23, 2019).

In fact, evidence showed that the odors have improved in light of ETC's voluntarily use of various methods to reduce odor: including misting deodorizers, spray-on daily cover, and new gas management systems. For example, Polk County's second witness, Shard Jacoby, testified that Landfill odors have gotten "better the last few weeks." (MT-57:21, Apr. 17, 2019). ETC's George Gibbons testified, without contradiction, regarding the limited number of citizen complaints ETC received in 2017 and 2018. (MT-118, Apr. 23, 2019). The Georgia Supreme Court has held that a trial court abuses it discretion where it enters a preliminary injunction to abate a nuisance in light of uncontroverted evidence that a nuisance has

improved. *See Bruce*, 274 Ga. at 531 (2001) (reversing preliminary injunction). For the same reasons, the trial court abused its discretion here.[7]

b) *Polk County presented no evidence that the injunction's requested provisions would abate such a nuisance.*

Even assuming Polk County presented sufficient evidence of a nuisance, the evidence established that the injunctive relief Polk County requests that is at issue—(1) six inches of soil daily to cover any waste deposited in the landfill on that day and (2) leaving the previous day's soil cover in place—will not abate the odor.[8]

An interlocutory injunction "is a device to keep the parties in order, and prevent one from hurting the other whilst their respective rights are under adjudication." *Ayer v. Norfolk Timber Inv., LLC*, 291 Ga. App. 409, 410 (2008). "There must be some *vital necessity* for the injunction so that *one of the parties will not be damaged* and left without adequate remedy." *Hampton Island Founders v.*

[7] The trial court's finding in paragraph 5 of its Order denying a stay (R-393-96) that problems at the Landfill "have become greater and greater and have now reached urgent proportions" has no evidentiary basis in the record.

[8] Polk County also requested that the Court order ETC to (1) cover sludge or other odorous loads of waste daily within the working face of the landfill; (2) record and investigate odor complaints to determine the source and patterns of the odors, including the leachate pond; (3) maintain and expand the gas collection system in accordance with the approved methane gas extraction plan; and (4) use appropriate misting deodorizers or neutralizers at strategic locations around the landfill. However, ETC has already undertaken these measures and Polk County's expert has testified that there is no issues with ETC's performance of these measures. (MT-145–146:10–6, Apr. 23, 2019).

Liberty Capital, 283 Ga. 289, 293 (2008) (emphasis added); *see also City of Columbus v. Myszka*, 246 Ga. 571, 573 (1980) (holding that an injunction is proper for a "continuing" nuisance only if the "the consequences are reasonably certain").

Here, there is no evidence of a vital necessity for the trial court to require ETC to use six inches of soil to cover daily waste and leave the previous day's soil in place. Polk County's expert, Mr. McCormick, could not testify that his proposals, which the preliminary injunction adopts, will work. Mr. McCormick only testified that his proposal to use six inches of soil as daily cover and leave that soil in place "might" work because "it's really trial or error." (MT-147:14–17, Apr. 17, 2019). In fact, Mr. McCormick admitted that he had no experience with using soil as daily cover to reduce odor, and he had not evaluated the effectiveness of using alternative spray-on covers, which ETC previously used consistent with the Operating Agreement and EPD permits. (*Id.* 150:18). Conversely, the uncontroverted testimony of David Pepper established that using six inches of soil as daily cover and leaving it in place without stripping it off daily would lead to worse odors because of gas pockets forming and leachate breakouts. (MT-152–153, Apr. 23, 2019). Polk County's unfounded speculation of "trial and error" to support its preliminary injunction falls woefully short of the "vital necessity" required for an injunction.

4. **The trial court erred by granting Polk County relief that it did not request.**

Finally, the trial court also erred by granting relief that Polk County did not request by preventing ETC from accepting sludge. (R-350). It is axiomatic that a party against whom injunctive relief is sought must receive proper notice of the scope of that injunctive relief so that the party can present evidence on the issue. *See, e.g.*, *Abel & Sons Concrete, LLC v. Juhnke*, 295 Ga. 150, 152 (2014) (reversing preliminary injunction where appellants did not have proper notice that court would issue injunction after summary judgment motions); *Smith v. Guest Pond Club, Inc.*, 277 Ga. 143, 143 (2003) (reversing preliminary injunction where appellants did not have proper notice that court would issue preliminary injunction at hearing on temporary restraining order).

Here, Polk County's motion for a preliminary injunction makes no mention of seeking to enjoin ETC's collection of sludge. That request was first made during Polk County's closing argument, and ETC did not have the opportunity to present evidence regarding the alleged impact of sludge. (*Compare* R-277-81, *with* MT-203–204, Apr. 23, 2019). And even assuming such a request had been properly made, the necessity to enjoin sludge collection is unsupported by the evidence. Mr. McCormick testified and noted in his report that a March 5, 2019 inspection revealed "[a] load of sludge on the working face observed. No strong or unusual odors were recognized in the load of sludge." (MT-138:1–3; Apr. 17, 2019). Similarly, his

September 25, 2017 report indicates that the sludge disposed of at the landfill is consistently within 5 to 6 percent, which "is a moderate and manageable amount." (Ex. P17). Even Mr. McCormick's proposals, which the PI Order adopts, did not propose a ban of sludge. Thus, the trial court erred by enjoining ETC's collection of sludge without proper notice or sufficient evidence on the issue.

For all of these reasons, ETC is likely to prevail on the merits of its appeal.

B. ETC will suffer irreparable harm in the absence of a stay.

The second factor in considering a stay pending appeal is whether the applicant will suffer irreparable harm without a stay. *Green Bull Georgia Partners, LLC*, 301 Ga. at 474. "An application for a stay or injunction pending appeal may present an additional sort of irreparable harm—the prospect of the appeal becoming moot and the right of appellate review being lost as a result." *Id.* at 475.

ETC faces exactly such irreparable harm now: either comply with the injunction and jeopardize its right to appeal or disregard the injunction and risk contempt of court by its failure. *See Jackson v. Bibb Cnt'y School Dist.*, 271 Ga. 18, 19 (1999) ("[I]f the thing sought to be enjoined in fact takes place, the grant or denial of the injunction becomes moot. . . . "); *see also Brian Stimpson, et al., Georgia Appellate Practice Handbook*, § 5.4.3 Injunctions at 86 (7th ed. 2012) ("[I]n the case of a mandatory injunction [which compels a particular act], the party subject to the injunction must seek a suspension or modification of the order or, alternatively, defy

the order so as to preserve appellate review of the order."). Here, ETC will suffer irreparable harm by losing its appeal to mootness if the Court does not stay the trial court's preliminary injunction.

In addition to losing the right to appeal, ETC will also suffer irreparable harm because the trial court did not require Polk County to post a bond or cash deposit. The estimated monthly cost to ETC in complying with the trial court's preliminary injunction is $282,407. (R-385-86). This amounts to nearly $850,000 for ETC to comply with the trial court's injunction for the 90-day period provided by the trial court's injunction order, conditions which are above and beyond any requirements of the Operating Agreement or the Landfill permit. Without a bond from Polk County or other security, ETC has no ability to recover this money spent in compliance with the trial court's injunction or to remediate the environmental issues discussed in section D below. *See Hogan Mgmt. Servs., P.C. v. Martino*, 242 Ga. App. 791, 794 (2000) (holding that a court protects "a wrongfully restrained party's rights by ensuring that there is a sum of money to pay any damages" in the form of bond or security deposit). Thus, ETC will suffer irreparable harm if this Court does not stay the preliminary injunction pending appeal.

C. <u>A stay threatens minimal harm to other parties.</u>

As discussed above, only a few, vocal Polk County residents have complained about odors and buzzards near the Landfill. These 4-5 individuals have made the

same complaints regarding the same odors for nearly a decade. (MT-118:10–12, Apr. 23, 2019). As noted above, testimony established that odors have improved since ETC implemented in 2018 a variety of proactive measures to reduce odors and buzzards. (MT-57:21, Apr. 17, 2019). In fact, any potential harm that these individuals face is speculative at best because Polk County's own expert has testified that he does not even know if his suggestion of using six inches of soil as daily cover would work, but merely "trial and error" that may or may not improve odors and buzzards. (*Id.* 147:14–17). Thus, a stay of the preliminary injunction pending appeal threatens minimal harm to other parties with an interest in this case.

D. <u>The public interest favors a stay of the injunction.</u>

The evidence presented below shows that the public interest weighs heavily in favor of staying the injunction in this case. Testimony from ETC's operations manager James Cummings established that if ETC is not permitted to strip or remove soil used as daily cover from the Landfill that "leachate is not going to [flow] down to where it needs to go to be collected, and it's going to come out [of] the sides of the landfill, which causes odor issues, [and] environmental issues . . ." (MT-34–35, Apr. 23, 2019). Furthermore, not stripping the soil results in these "leachate popouts" that can negatively impact storm water, and lead to methane gas pockets that result in worse odors. (*Id.* 153:9–25.) The cost to remediate a leachate breakout can amount to hundreds of thousands of dollars depending on its severity and a breakout presents

substantial environmental concerns. (R-385). Polk County's own expert acknowledged this environmental risks and testified that stripping might be acceptable to him. (MT-147, Apr. 17, 2019; McCormick Dep., pp. 44, 46). The necessity to strip soil daily to address these concerns was not only established by uncontroverted testimony, the EPD was the party who "suggest[ed] that you strip the soil before you put the next day['s trash] in." (MT-168:3–5, Apr. 23, 2019). Yet, the trial court ordered no stripping of soil as daily cover. This provision of the injunction is contrary to the public interest given risks of leachate breakouts and methane gas pockets.

Additionally, the trial court's order presents substantial risk of harm to local water treatment plants in Cedartown and Rockmart. (R-385). Prior to the Court's preliminary injunction order, and even before ETC took over Landfill operations, ETC accepted sludge from the cities of Cedartown and Rockmart, as well as a number of businesses in Polk County. (*Id.*) The sludge from these cities is from their waste water treatment operations. (*Id.*) ETC has now incurred the cost to transport this sludge to other facilities. (*Id.*) But, if ETC refused to accept the sludge, the cities could face operational and environmental issues in treating their water. (*Id.*) Additionally, one of the sources ETC accepts sludge from, a waste water treatment plant ("WWTP"), disposes of ETC's leachate. (*Id.*) The inability to dispose of ETC's leachate at this WWTP also presents an environmental issue. (*Id.*)

V. CONCLUSION

For all of these reasons, ETC respectfully requests that this Court stay the trial court's preliminary injunction pending appeal.

Respectfully submitted, this 14th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

Pursuant to Rule 6, I hereby certify that on June 14, 2019, a copy of the foregoing was served on the following counsel by U.S. Mail:

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